Supreme Court, U.S.
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No. ____ OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

JOHN KEANE, Superintendent,
Woodbourne Correctional Facility,

Petitioner,

v.

FELIBERTO ERAZO,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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November 12, 2002

QUESTION PRESENTED

Whether *United States v. DiFrancesco*, 449 U.S. 117 (1980), "clearly established," for purposes of federal habeas corpus review, that the Double Jeopardy Clause of the United States Constitution bars a legal sentence increase in a non-capital case.

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OPINIONS BELOW

The unpublished opinion of the Court of Appeals for the Second Circuit (App., *infra*, 1a - 2a) is reported at 42 Fed. Appx. 527; 2002 U.S. App. LEXIS 16623 (2d Cir. 2002) (Jacobs, Cabranes, and Parker, CJJ). The memorandum decision of the United States District Court for the Eastern District of New York (Sifton, D.J.) (App., *infra*, 3a - 23a), which was adopted by the Second Circuit, is unreported. The decision of the New York State Court of Appeals denying the state prisoner's application for leave to appeal to that court from the July 6, 1999 decision of the Appellate Division, Second Department (App., *infra*, 24a), is reported at 94 N.Y.2d 822, 702 N.Y.S.2d 592 (1999). The decision of the Appellate Division, Second Department, unanimously affirming the state prisoner's amended judgment of conviction (App., *infra*, 25a - 26a), is reported at 263 A.D.2d 460, 691 N.Y.S.2d 908 (2d Dept. 1999). The decision of the New York State Supreme Court denying defendant's motion to set aside sentence (App., *infra*, 27a - 32a) is not reported. The decision of the Appellate Division, Second Department, granting reargument, and, upon reargument, vacating its prior order and substituting an order in its stead (App., *infra*, 33a - 35a), is reported at 226 A.D.2d 741, 622 N.Y.S.2d 86 (2d Dept. 1996). The decision of the New York State Court of Appeals denying the state prisoner's application for leave to appeal to that court from the January 30, 1995 decision of the Appellate Division, Second Department (App., *infra*, 36a), is reported at 86 N.Y.2d 734, 631 N.Y.S.2d 615 (1995). The decision of the Appellate Division, Second Department, reducing the state prisoner's sentence and otherwise affirming the judgment of conviction (App., *infra*, 37a - 39a), is reported at 211 A.D.2d 809; 622 N.Y.S.2d 86 (2d Dept. 1995).

JURISDICTION

This petition for a writ of *habeas corpus* was filed in the Eastern District of New York invoking federal jurisdiction under 28 U.S.C. § 2254. On August 20, 2002, Eastern District Judge Charles P. Sifton granted the petition and ordered the release of the petitioner if the state failed to re-sentence him to a term of from seven and one-half to fifteen years in prison within 30 days of the date of the order. The court denied the State's request to stay the effect of the order pending appeal. Pursuant to the District Court's order, defendant was re-sentenced on September 24, 2001.

On August 14, 2002, the Second Circuit, which acquired jurisdiction under 28 U.S.C. sections 1291 and 2253, entered a judgment and opinion affirming the District Court's issuance of the writ (App., *infra.*, a).

This petition for certiorari is filed within ninety days of that date, and is, therefore, timely. Sup. Ct. R. 13.1. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part: "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb."

Section 2254(d) of [Chapter] 28 of the United States Code provides:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States[.]

STATEMENT OF THE CASE

On January 28, 1991, at approximately 8:30 p.m., defendant sold cocaine to three people who were subsequently arrested in possession of that cocaine. Shortly thereafter, the police arrested defendant and recovered $155.00 from his pocket and twenty-one vials of cocaine from a paper bag on the curb near where defendant was standing.

State Court Proceedings

For these acts, defendant was charged by Queens County Indictment Number 10252/91 with three counts of Criminal Sale of a Controlled Substance in the Third Degree (N.Y. Penal Law § 220.39 [1]), one count of Criminal Possession of a Controlled Substance in the Third Degree (N.Y. Penal Law § 220.16 [1]), and one count of Criminal Possession of a Controlled Substance in the Fifth Degree (N.Y. Penal Law § 220.06 [5]).

On August 12, 1991, defendant pled guilty in Queens County Supreme Court, before Justice Seymour Rotker, to Criminal Sale of a Controlled Substance in the Third Degree (N.Y. Penal Law § 220.39 [1]) and Attempted Criminal

Possession of a Controlled Substance in the Third Degree (N.Y. Penal Law §§ 110/220.16 [1]). In exchange for his guilty plea, the court released defendant from custody until September 30, 1991 -- the sentencing date -- with the understanding that if defendant reappeared for sentencing, did not get rearrested in the meantime, and cooperated with the Department of Probation, the court would dismiss the third-degree sale count and sentence defendant to a prison term of from four to eight years on the attempted-possession count. On the other hand, if defendant failed to fulfill these conditions, the court informed defendant that it would not dismiss the third-degree sale count and would impose an enhanced sentence of either from twelve and one-half to twenty-five years as a second-felony offender or from fifteen years to life as a discretionary persistent felon. Defendant stated that he agreed to and understood these terms. The court arraigned defendant as a second-felony offender (*see* N.Y. Penal Law § 70.06) and a discretionary persistent felon (*see* N.Y. Penal Law § 70.10).[1]

On September 30, 1991, defendant failed to appear for sentencing, and the court ordered a warrant for his arrest and return. On October 18, 1991, the court conducted a hearing regarding the State's efforts to locate defendant, following which it sentenced defendant to an indeterminate prison term of from fifteen years to life as a discretionary persistent felony offender.

On December 2, 1991, defendant involuntarily appeared in court after being arrested for burglary and grand larceny. On that date, defendant claimed that he had not appeared for his sentencing on September 30th because he had

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[1] Defendant admitted that he had been previously convicted of the two felonies underlying the persistent felony adjudication and did not contest the constitutionality of those convictions.

been trying to locate the true perpetrator of the drug sale. Defendant explained that he had pled guilty only to gain his release from custody in order to find the real culprit. According to defendant, although he successfully located the true drug seller, he still did not return to court because the brothers of the true drug seller attacked defendant, hitting him in the face with a gun. Thereafter, defendant decided to "turn himself in" after Thanksgiving. But, defendant explained, his good intentions were again thwarted because, the very day that he was returning to court, an unmarked police car chased him into a house and, as a result, defendant was charged with burglary and grand larceny. After listening to defendant's excuses for failing to return to court, the court executed the previously imposed sentence of from fifteen years to life imprisonment.

The Direct Appeal

On December 11, 1991, defendant filed a notice of appeal in the New York Supreme Court, Appellate Division, Second Department. In his brief, filed on or about September 4, 1994, defendant represented that he had been convicted of *Attempted* Criminal Sale of a Controlled Substance in the Third Degree, although he had actually been convicted of the greater crime of Criminal Sale of a Controlled Substance in the Third Degree and Attempted Criminal Possession of a Controlled Substance in the Third Degree. Defendant raised six claims in his brief, including that his sentence as a persistent felony offender was harsh and excessive.

The State filed a brief in opposition to defendant's claims, arguing, *inter alia*, that defendant's sentence was proper and appropriate. The State, however, also noted that defendant had been convicted of *Attempted* Criminal Sale of a Controlled Substance in the Third Degree rather than the completed crime.

In a decision and order dated January 30, 1995, a four-judge panel of the Appellate Division, Second Department, affirmed and modified defendant's judgment of conviction. *People v. Erazo*, 211 A.D.2d 809, 622 N.Y.S.2d 86 (2d Dept. 1995). Specifically, the court rejected as meritless defendant's first five claims, including his claim that the sentencing court had improperly adjudicated him a discretionary persistent felon. *Id.* With respect to defendant's final claim, the court determined that defendant's prison sentence of from fifteen years to life was unduly harsh and excessive, and modified that sentence to an indeterminate prison term of from seven and one-half to fifteen years -- the maximum permissible prison term for a predicate non-violent felony offender convicted of "C" non-violent felony offense. *Id. See* N.Y. Penal Law § 70.06. In its decision, however, the court erroneously stated that defendant had been convicted of *Attempted* Criminal Sale of a Controlled Substance in the Third Degree instead of the completed crime. *Id.*

On April 30, 1995, the State filed with the Appellate Division, Second Department, a motion, pursuant to 22 N.Y.C.R.R. § 670.6 (a), asking the court to reconsider its January 30, 1995 decision and to issue an order vacating that decision and affirming defendant's judgment of conviction. In that motion, the State pointed out that, in their appellate briefs, both parties had misstated defendant's conviction as one for Attempted Criminal Sale of a Controlled Substance in the Third Degree, rather than Criminal Sale of a Controlled Substance in the Third Degree. In addition, the State argued that, most likely as a result of its misapprehension of defendant's conviction, the Court had reduced defendant's fifteen-year-to-life prison sentence to a prison term of from seven and one-half to fifteen years, which was an illegally low sentence for a discretionary persistent felon. In an affirmation dated May 15, 1995, defendant opposed the State's motion for reargument on the grounds that it was both

untimely and meritless. In addressing the merits of the State's claim, defendant stated: "Appellant pled guilty to attempted criminal possession of a controlled substance 3rd" and argued that "it was obvious that the later imposed life sentence was improper and that the Appellate Division's modification was approiate [sic]." On August 9, 1995, the Appellate Division summarily denied the State's motion for reconsideration.[2]

In the interim, in a letter dated June 5, 1995, defendant's appellate counsel sought leave to appeal the Appellate Division's January 30, 1995 decision to the New York Court of Appeals. In that letter, counsel raised all of the same issues that defendant had raised to the Appellate Division. Judge Carmen Beauchamp Ciparick denied defendant leave to appeal on December 28, 1995. *People v. Erazo*, 86 N.Y.2d 734, 631 N.Y.S.2d 615 (1995).

On April 29, 1996, the Appellate Division *sua sponte* recalled and vacated its January 30, 1995 order, and granted the State's motion to reconsider defendant's appeal. In its revised order, the Appellate Division affirmed defendant's conviction for Criminal Sale of a Controlled Substance in the Third Degree, and, modifying the judgment on the law and as a matter of discretion in the interest of justice, vacated the original sentence imposed and remitted the matter to the

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[2] After the Appellate Division summarily denied the State's motion to reconsider defendant's appeal, David Tarr, a clerk in the Queens County Supreme Court, submitted a letter, dated November 20, 1995, apprising the Appellate Division that the records of the Elmira Correctional Facility revealed that defendant had been convicted of Criminal Sale of a Controlled Substance in the Third Degree but that the Appellate Division's January 30, 1995 order modified defendant's conviction to Attempted Criminal Sale of a Controlled Substance in the Third Degree. Mr. Tarr pointed out that the problem was "obvious." Neither party sought to expand the judgment roll on appeal to include this document.

sentencing court for re-sentencing. *People v. Erazo*, 226 A.D.2d 741, 622 N.Y.S.2d 86 (2d Dept. 1996).

The Re-sentencing

On June 4, 1996, the Supreme Court, Queens County, re-sentenced defendant to concurrent indeterminate prison terms of from twelve and one-half to twenty-five years on the sale count and from four to eight years on the attempted possession count.

State Collateral Review

On June 19, 1996, defendant submitted a *pro se* motion pursuant to Section 440.20 of the New York Criminal Procedure Law. In that motion, defendant contended that his sentence of from twelve and one-half to twenty-five years, which had been imposed by the court on re-sentencing, was illegal and unauthorized because it did not comply with the by-then-vacated January 30, 1995 Appellate Division order that had misstated defendant's crime and had reduced defendant's sentence of from fifteen years to life imprisonment to a prison term of from seven and one-half to fifteen years. On July 31, 1996, the state opposed the motion, arguing that defendant's re-sentence to a prison term of from twelve and one-half to twenty-five years was authorized and legal.

On August 27, 1996, the court denied defendant's motion to vacate his re-sentence. Specifically, the court held that defendant's re-sentence to a prison term of from twelve and one-half to twenty-five years was legal and authorized for a persistent non-violent felony offender convicted of a class "B" felony. *See People v. Erazo*, ___ Misc.2d ___ , *2-3 (Sup. Ct. Queens Co. 1996).

The Direct Appeal from the Re-sentencing

In January 1999, defendant appealed from the June 4, 1996 re-sentencing. In his brief, defendant argued that: (1) the Appellate Division did not have the authority to recall and vacate its January 30, 1995 order modifying defendant's sentence because the modified sentence was not defective, did not result from any clerical error, and because defendant had an expectation of finality in that modified sentence; (2) defendant's prison sentence of from twelve and one-half to twenty-five years -- imposed on June 4, 1996 -- was unduly harsh considering defendant's criminal background, personal history, and the Appellate Division's previous modification of his sentence to an indeterminate prison term of from seven and one-half to fifteen years; and (3) defendant received the ineffective assistance of counsel at re-sentencing because a conflict of interest existed with respect to the attorney who represented him at sentencing.

On March 8, 1999, the State submitted a respondent's brief, arguing that, as a threshold matter, defendant waived his two claims regarding the legality and harshness of his sentence by signing a waiver of his right to appeal. The State further argued that: (1) the Appellate Division properly vacated the sentence it had previously modified because the modified sentence was illegal and defendant did not have a legitimate expectation of finality in the illegal modified sentence; (2) the court properly sentenced defendant to an indeterminate prison term of from twelve and one-half to twenty-five years; and (3) defendant's counsel afforded him meaningful representation, and there was no potential for a conflict of interest.

On July 6, 1999, the Appellate Division affirmed defendant's amended judgment of conviction, holding that defendant's sentence was not excessive, and that defendant's

remaining arguments lacked merit. *See People v. Erazo*, 263 A.D.2d 460, 691 N.Y.S.2d 908 (2d Dept. 1999). In support of the latter holding, the Court relied upon 22 N.Y.C.R.R.670.6 [a], *Cuyler v. Sullivan*, 446 U.S. 335 (1980), *People v. Wright*, 56 N.Y.2d 613, 450 N.Y.S.2d 473 (1982); and *People v. Adams*, 247 A.D.2d 819, 668 N.Y.S.2d 844 (4th Dept 1998).

In a letter dated August 26, 1999, defendant sought leave to appeal the Appellate Division's July 6, 1999 decision to the New York Court of Appeals. The State opposed defendant's application, and on March 29, 1999, Judge Carmen Beauchamp Ciparick again denied defendant leave to appeal. *People v. Erazo*, 94 N.Y.2d 822, 702 N.Y.S.2d 592 (1999).

Federal Court Proceedings

The Petition For a Writ of Habeas Corpus

On February 23, 2001, defendant filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of New York. In that petition, defendant challenged his conviction and continued incarceration, arguing that the Appellate Division's vacatur of its January 30, 1995 order reducing defendant's prison sentence to seven and one-half to fifteen years violated defendant's Fifth Amendment right against Double Jeopardy because defendant had a legitimate expectation of finality in that erroneously modified sentence.

On June 5, 2001, the State filed a response to the petition, arguing that the petition for a writ of habeas corpus should be summarily denied because defendant had failed to show that the state court's rejection of his Double Jeopardy claim was contrary to, or an unreasonable application of, well-established Supreme Court precedent. Moreover, the State argued that, to the extent that defendant's argument

relied on his claim that the state court had misinterpreted New York's sentencing statute regarding discretionary persistent felon status, his claim was not cognizable on habeas review as it failed to present a question of federal constitutional dimension.

Likewise, the State argued that defendant's contention that the communication between Supreme Court clerk David Tarr and the Appellate Division was improper had not been fully exhausted in the state courts and was, thus, not cognizable by the habeas court. Finally, the State argued that vacatur of defendant's reduced sentence of from seven and one-half to fifteen years imprisonment did not violate defendant's Fifth Amendment privilege against Double Jeopardy because defendant had no expectation of finality in that sentence as it was illegal and premised on a mistake; thus, the Appellate Division had the inherent power to correct the sentence. Therefore, the State concluded, defendant was not entitled to habeas corpus relief.

On August 16, 2001, the District Court conditionally granted the petition and ordered defendant's release if he was not re-sentenced within thirty days. *Erazo v. Keane*, __ F.Supp.2d __, *2, No. CV-01-1101 (E.D.N.Y. August 16, 2001). The court held that the Appellate Division's decision vacating its prior order reducing defendant's sentence was an unreasonable application of Supreme Court precedent because defendant had an expectation of finality in the modified sentence. *Id.* at *14. Moreover, the court reasoned that while the Appellate Division may have reduced defendant's sentence based on its erroneous belief that defendant had been convicted of a "C" felony instead of a "B" felony -- a belief that was fostered by both defendant's brief and the State's brief -- this "mutual mistake" could not be corrected by the court pursuant to state law, because it was not akin to a clerical error; nor was the sentence illegal for a

"B" felony. *Id.* at *18-20. Thus, the court concluded, the Appellate Division exceeded its powers under state law by vacatingdefendant's reduced sentence more than one year after it was imposed, and, in turn, violated defendant's constitutional right not to be put twice in jeopardy. *Id.* at 22.

On September 18, 2001, the State filed a notice of appeal in the United States District Court for the Eastern District of New York and, on September 4, 2001, the State sought a stay of the District Court's order pending this appeal. On September 17, 2001, the District Court denied the State's request to stay the order pending this appeal, and ordered that defendant be released from custody unless the State resentenced him by September 21, 2001, to a term of imprisonment of no more than seven and one-half to fifteen years. Pursuant to the District Court's order, defendant was resentenced to seven and one-half to fifteen years on September 24, 2001.

The State's Appeal

The state appealed to the Second Circuit, arguing that the District Court erred when it granted defendant's petition for a writ of habeas corpus in this case. Specifically, the State contended, first, that the state court's rejection of defendant's Double Jeopardy claim was not an unreasonable application of this Court's precedent in *United States v. DiFrancesco*, 449 U.S. 117 (1980), because that case did not clearly establish that the Double Jeopardy Clause may bar enhancement of a legal sentence in a non-capital case. To the contrary, *DiFrancesco* actually stands for the opposite proposition, as it establishes that the increase of a sentence does not fall within any of the three proscriptions of the Double Jeopardy Clause: retrial after acquittal, retrial after conviction, or imposition of multiple punishments for the same offense. And, the State argued, to the extent that *DiFrancesco*'s dicta regarding a

defendant's legitimate expectation of finality has been transformed by some circuit courts into a rule extending Double Jeopardy protection to the sentencing context, this rule would be insufficient to satisfy AEDPA's prohibition of the grant of a writ of habeas corpus on the basis of anything other than Supreme Court precedent, as opposed to the dicta of this Court or the holdings of circuit courts - especially as such a rule is not even clearly established in the circuit courts, as both the Fourth and Sixth Circuits have expressly concluded that *DiFrancesco* bars application of the Double Jeopardy Clause to the sentencing context, and, even this Court has explicitly stated that, as of 1994, no Supreme Court precedent governed the issue of whether Double Jeopardy protections extended to issues involving increase of legal, non-capital sentences.

Second, the State argued that, even assuming that *DiFrancesco* did establish the applicability of the Double Jeopardy Clause to the sentencing context, and even adopting the Second Circuit's "legitimate expectation of finality" test, Double Jeopardy principles would still not bar imposition of defendant's ultimate sentence of twelve and one-half to twenty-five years, because defendant had been told at the time of his guilty plea that he faced this potential sentence, and defendant did not acquire a legitimate expectation of finality in his reduced sentence of seven and one-half to fifteen years because, based on New York law, the Appellate Division retained the authority to vacate the order imposing that sentence. First, that order was illegal and void *ab initio* because it changed the crime of which defendant was convicted -- a result that exceeded the bounds of the Appellate Division's power on appeal. Thus, vacatur of the entire order, including the sentence modification, was permissible and proper, defeating defendant's claim of a legitimate expectation of finality. Second, the sentence reduction was based on a clerical error, clearly ascertainable

from the record, which the Appellate Division was entitled to correct *sua sponte*. Third, the Appellate Division's misapprehension of the crime of which defendant had been convicted, and concomitant reduction of defendant's sentence, was based on defendant's affirmative misrepresentation of his crime in his appellate brief. And, to the extent that his initial misrepresentation was actually inadvertent, defendant lost any legitimate expectation of finality by the time of the State's motion for reargument, when it became apparent that the court had relied on his error, and when defendant refused to acknowledge his misstatement and, instead, actually attempted to mislead the court.

And the District Court's holding to the contrary -- premised on its conclusion that the Appellate Division's erroneous statement that defendant had been convicted of attempted sale of a controlled substance, instead of the completed crime, did not amount to a "clerical error" under state law, and was not founded on a "misrepresentation" that would defeat the legitimacy of defendant's expectation of finality -- constituted an improper exercise of the federal courts' power on habeas corpus because, to the extent that the State court chose to interpret its definitions of "clerical error" or "misrepresentation" to encompass the unusual situation in this case, its interpretation of New York State law would not present a federal question cognizable on habeas corpus review.

Defendant argued that this Court's decision in *United States v. DiFrancesco* did clearly establish the applicability of the Double Jeopardy Clause as a bar to a legal sentence modification made after a defendant acquires a legitimate expectation of finality in his sentence. Moreover, defendant argued, the sentence modification in this case was not legal because, according to state law, the Appellate Division

allegedly lacked the power to vacate its initial order because that order was not the product of a clerical error or defendant's fraud or misrepresentation. In this vein, defendant argued that the definition of clerical error under state law could not encompass the situation at bar, and that an inadvertent misrepresentation on the part of a defendant did not amount to fraud so as to warrant the Appellate Division's action.

On August 14, 2002, the Second Circuit issued a summary order affirming the District Court's judgment granting the petition, holding, simply, that there was "no error in the district court's decision," and, thus, affirming "for substantially the reasons stated in that court's Memorandum and Order . . . ." *Erazo v. Keane*, 42 Fed. Appx. 527 (2d Cir. 2001).

Petitioner now seeks a Writ of Certiorari from this Court to review the judgment and opinion of the United States Court of Appeals for the Second Circuit.

REASONS FOR GRANTING THE WRIT

I. The Second Circuit's Use of its Own "Legitimate Expectation of Finality" Rule as a Benchmark by Which to Gauge the Reasonableness of the State Courts' Decisions Contravenes the Plain Language of 28 U.S.C. § 2254(d)(1) and this Court's Holding in *Williams v. Taylor*, 529 U.S. 362 (2000).

Pursuant to the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), which governs the petition in this case, a defendant cannot prevail on habeas corpus review with respect to any claim involving a question of law that was adjudicated on the merits in state court unless he or she can demonstrate that the state court's decision was

"contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). Recently, this Court has explained the import of this section in *Williams v. Taylor*, 529 U.S. 362 (2000). First, by requiring that the federal law be "clearly established . . . as determined by the Supreme Court of the United States," this section limits the source of federal law that a habeas defendant can use to override a state-court decision to those that have already been determined by the Supreme Court. If the Supreme Court "has not broken sufficient legal ground to establish an asked-for constitutional principle, the lower federal courts cannot themselves establish such a principle with clarity sufficient to satisfy the AEDPA bar." *Williams v. Taylor*, 529 U.S. at 412.[3] Thus, when a defendant seeks review of a claim that was adjudicated on the merits in state court,[4] "[t]he threshold question under AEDPA is whether [the defendant] seeks to apply a rule of law that was clearly established at the time his state-court conviction became final;" the second question is whether there is a Supreme Court decision that clearly establishes the rule. *Id.* With

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[3] This is a change from prior law, which "allowed the United States courts of appeals to rely on their own jurisprudence in addition to that of the Supreme Court." *Williams v. Taylor*, 529 U.S. at 412 (quoting *Lindh v. Murphy*, 96 F.3d 856, 869 [7th Cir. 1996], *rev'd and remanded on other grounds*, 521 U.S. 320 [1997]).

[4] The District Court correctly concluded that defendant's Double Jeopardy7 claim, which was presented to the Appellate Division on defendant's direct appeal from his re-sentencing, was adjudicated on the merits in state court, notwithstanding the Appellate Division's summary affirmance of defendant's conviction, which contained no discussion or explicit reference to defendant's federal claim. *See Sellan v. Khulman*, 261 F.3d 303 (2d Cir. 2001) (summary decision, without any analysis, is still an adjudication on the merits); *Aparicio v. Artuz*, 269 F.3d 78 (2d Cir. 2001) (in spite of one-line decision denying claim, without mentioning federal law or constitutional claim, state court was still presumed to have decided the issue on substantive grounds).

respect to the latter of these considerations, Justice O'Connor explained that in limiting the source of federal law to that established by the Supreme Court, the statute "refers to the holdings, as opposed to the dicta, of this Court's decisions." *Id.*

In granting the writ of habeas corpus in this case, the District Court reasoned that the state court's decision rejecting defendant's Double Jeopardy claim was an unreasonable application of this Court's precedent in *United States v. DiFrancesco*, 449 U.S. 117 (1980), because defendant had developed a legitimate expectation of finality in his reduced sentence when the prosecution's motion for reargument was denied and, thus, pursuant to *DiFrancesco, as interpreted by the circuit courts*, the Appellate Division should have found that vacatur of defendant's reduced sentence and his subsequent re-sentencing violated the prohibition against Double Jeopardy. *See Erazo v. Keane*, __ F.Supp.2d __, at *13-14, *citing Stewart v. Scully*, 925 F.2d 58, 63 (2d Cir. 1991); *United States v. Triestman*, 178 F.3d 624, 630 (2d Cir. 1999); *United States v. Foumai*, 910 F.2d 617, 619-20 (9th Cir. 1990). But the District Court's analysis on this point was doubly flawed.

First, as the District Court acknowledged, the "legitimate expectation of finality" test was created by the *circuit courts* to evaluate Double Jeopardy claims premised on post-conviction increases in a defendant's sentence -- it is not a rule fashioned by the Supreme Court. And while this Court in *DiFrancesco* did note that the defendant there had "no expectation of finality in his sentence until the appeal is concluded or the time to appeal has expired," it did not rely on this ground in denying the defendant's claim; nor did it ever state the converse: that once a defendant *does* acquire an expectation of finality in his sentence, Double Jeopardy *will* bar a subsequent increase. Yet it is precisely this

transformation of *DiFrancesco's* dicta that has formed the basis for the circuit-court-rule relied upon by the lower courts in this case. And, because this is only a circuit court rule, premised, at best, on this Court's dicta, it cannot constitute a clearly-established holding of the Supreme Court, and, thus, cannot support a grant of habeas relief. *See* 28 U.S.C. § 2254(d)(1); *Williams v. Taylor*, 529 U.S. at 362.[5] Thus, in granting the writ of habeas corpus in this case on the basis of its own precedent, derived at most from this Court's dicta, the Second Circuit violated the clear language of the AEDPA and this Court's holding in *Williams v. Taylor*. The Second Circuit's decision in this case, which simply mirrors its holdings in numerous other cases that have also presented this issue (*see, e.g., Stewart v. Scully*, 925 F.2d 58, 63 [2d Cir. 1991]; *United States v. Triestman*, 178 F.3d 624, 630 [2d Cir. 1999]), should be corrected by this Court.

Second, the sharp split of authority among the circuit courts as to *DiFrancesco*'s meaning (*see, infra*, section II) should itself defeat any contention that the rule established by that case -- whether in dicta or in the main holding -- is "clearly established" in any sense of the word. This issue, too, is worthy of this Court's attention, as it would provide guidance to the lower courts, not only with respect to

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[5] Moreover, it must be noted that no holding of this Court prior or subsequent to *DiFrancesco* has established that Double Jeopardy protection extends to a non-capital sentence (see *infra*, Point III). Concededly, the protection has been extended in this Court's dicta (*see, e.g., United States v. Benz*, 282 U.S. 307), and in various dissenting opinions. *See, e.g., Jones v. Thomas*, 491 U.S. 376, 394 (1989) (Scalia, dissenting) (disagreeing with the majority's opinion that "the Double Jeopardy Clause does no more than prevent the sentencing court from imposing greater punishment than the legislature intended," and arguing that the clause also protects the defendant's "legitimate expectation of finality in the original sentence"). However, as these do not constitute "holdings" of the Supreme Court, they cannot operate to establish the principle with sufficient clarity to satisfy the AEDPA bar.

substantive Double Jeopardy claims, but also with respect to habeas claims in general, by more clearly defining the phrase "clearly established."

II. There Is a Sharp Split of Authority among the Circuit Courts on the Issue of Whether This Court's Decision in *United States v. DiFrancesco*, 449 U.S. 117 (1980), Precludes, or Rather Mandates, the Applicability of the Double Jeopardy Clause to Bar a Sentence Increase in a Non-capital Case.

In the twenty-two years following this Court's decision in *DiFrancesco*, the circuit courts have sharply spilt on the meaning of that highly significant case. And the split is not on a minor point -- it is on the threshold question of whether Double Jeopardy applies to bar an increase of a sentence in a non-capital case. *Compare Ward v. Williams*, 240 F.3d 1238, 1242 (10th Cir. 2001) (the Double Jeopardy Clause "prevents a court from increasing a defendant's sentence once he had a legitimate expectation of finality in the original sentence"); *United States v. Townsend*, 178 F.3d 558, 565 (D.C. Cir. 1999); *United States v. Triestman*, 178 F.3d at 630; *Stewart v. Scully*, 925 F.2d at 63; *Hicks v. Duckworth*, 922 F.2d 409, 411 (7th Cir. 1991) ("The Supreme Court in *DiFrancesco* acknowledged that the key to the inquiry . . . is whether the defendant has a legitimate expectation of finality in his sentence"); *United States v. Foumai*, 910 F.2d 617, 619-20 (9th Cir. 1990); *Stone v. Godbehere*, 894 F.2d 1131, 1135 (9th Cir. 1990); *United States v. Jones*, 722 F.2d 632, 638 (11th Cir. 1983) (defendant's Double Jeopardy rights violated under *DiFrancesco* because "his legitimate expectations with respect to the duration of his sentence were frustrated by resentencing"); *with United States v. Strozier*, 940 F.2d 985 (6th Cir. 1991) ("although defendant argues that the District Court's actions in this case violated his right against Double Jeopardy, we doubt that such a claim exists under

DiFrancesco, in which the Court held that 'a criminal sentence does not have the qualities of constitutional finality that attend acquittal' for Double Jeopardy purposes"); *United States v. Lundien*, 769 F.2d 981 (4th Cir. 1985) (defendant's argument that sentence enhancement is barred by Double Jeopardy Clause "suffers fatally from the Supreme Court's decision in *DiFrancesco*, which expressly disavows the rationale on which our former Double Jeopardy rule in this resentencing area was based"); *see also Onifer v. Tyszkiewicz*, 255 F.3d 313 (6th Cir. 2001) (applying due process analysis to determine whether there is expectation of finality in a sentence based on *Lundien*'s holding that, in *DiFrancesco*'s wake, Double Jeopardy does not apply); *United States v. Davis*, 112 F.3d 118 (3rd Cir. 1997) (same); *DeWitt v. Ventetoulo*, 6 F.3d 32 (1st Cir. 1993) (same).[6]

This case squarely presents this issue, providing this Court with the opportunity to clarify its holding in *DiFrancesco*, resolve the split among the circuit courts, and resolve this highly significant question of federal constitutional law.

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[6] Many of the cases rejecting the applicability of the Double Jeopardy Clause to sentencing issues analyze the defendant's legitimate expectation of finality under the Due Process Clause. *See, e.g, United States v. Lundien*, 769 F.2d 981. The correctness of that approach has never been decided by this Court, thus there is no clearly established Supreme Court precedent that would authorize Due Process analysis on habeas corpus. This, too, militates in favor of granting certiorari in this case -- for, according to the reasoning of the Fourth Circuit, Sixth Circuit, Third Circuit, and First Circuit, all of which interpret *DiFrancesco* as precluding the applicability of the Double Jeopardy clause to the non-capital sentencing context, there simply is no clearly established Supreme Court precedent that applies to this highly important claim.

III. The Second Circuit's Interpretation of *DiFrancesco* as Clearly Establishing That the Double Jeopardy Clause Bars a Sentence Increase in a Non-capital Case Turns *DiFrancesco* on its Head and Runs Contrary to this Court's Dicta in Other Cases.

Not only has this Court never formulated or applied the "legitimate expectation of finality" test to evaluate a defendant's Double Jeopardy claim in the sentencing context, but, in fact, this Court has never even acknowledged that a defendant *can* ever acquire a constitutionally protected expectation of finality in a sentence; to the contrary, the Court has repeatedly suggested just the opposite. In *United States v. DiFrancesco*, this Court held that the Double Jeopardy Clause does not prohibit the increase of a defendant's sentence following the State's appeal. In reaching this conclusion, the Court explained that the guarantee against Double Jeopardy consists of three separate constitutional protections: "It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense." *United States v. DiFrancesco*, 449 U.S. at 129. But a sentence increase, according to the Court, did not fall within the penumbra of any of these three protections.

With respect to the first principle, this Court held that increasing a sentence following an appeal does not violate the Double Jeopardy Clause's guarantee against multiple trials because the sentencing process, which is "purely a judicial determination . . . that is not adversary in nature," is simply not comparable to a trial, and "does not approximate the ordeal of a trial on the basic issue of guilt or innocence." *Id.* at 136-37. Likewise, with respect to the second principle, this Court reasoned, "neither the history of sentencing practices, nor the pertinent rulings of this Court, nor even

considerations of Double Jeopardy policy support [the] equation" that "a criminal sentence, once pronounced, is to be accorded constitutional finality and conclusiveness similar to that which attaches to a jury's verdict of acquittal." *Id.* at 132.

In this vein, this Court explicitly rejected the argument, advanced by many circuit courts, that "for Double Jeopardy finality purposes, the imposition of the sentence is an 'implied acquittal' of any greater sentence." *Id.* at 136 n14, 133 (quoting Van Alstyne, *In Gideon's Wake: Harsher Penalties and the "Successful" Criminal Appellant*, 74 Yale L.J. 606, 634-35 [1965]). Tracing the Double Jeopardy protections to their common-law origins, this Court explained that, historically, the "pronouncement of sentence has never carried the finality that attaches to an acquittal," as the common-law writs of *autre fois acquit* and *autre fois convict* were protections against retrial, and did not bar the trial courts from increasing a sentence during the same term of court. *Id.* at 133-34, *citing Ex parte Lange*, 18 Wall. 163 (1874); *United States v. Wilson*, 420 U.S. 332 (1975). Additionally, this Court analyzed its own precedent, concluding that its prior "decisions in the sentencing area clearly establish that a sentence does not have the qualities of constitutional finality that attend an acquittal." *Id.* at 134, *citing Bozza v. United States*, 330 U.S. 160 (1947) (holding that a trial court's correction of its error in sentencing defendant to a lesser term did not violate Double Jeopardy because "the Constitution does not require that sentencing should be a game in which a wrong move by the judge means immunity for the prisoner"); *North Carolina v. Pearce*, 395 U.S. 711 (1969) (holding that there is no absolute constitutional bar to the imposition of a more severe sentence on re-conviction after the defendant's successful appeal of the original judgment of conviction). Thus, this Court reasoned, "if *any* rule of finality had applied to the pronouncement of a sentence, the original sentence in *Pearce* would have served as a ceiling on the one imposed at retrial. While *Pearce* dealt

with the imposition of a new sentence after retrial rather than, as here, after appeal, that difference is no more than a 'conceptual nicety.'" *United States v. DiFrancesco*, 449 U.S. at 135 (emphasis added). In thus reviewing its precedent, this Court derived the rule that "the Double Jeopardy Clause does not provide the defendant with the right to know at any specific moment in time what the exact limit of his punishment will turn out to be," and broadly concluded that, based on the critical differences between an acquittal and a sentence, "the Double Jeopardy Clause does not require that a sentence be given a degree of finality that prevents its later increase." *Id.* at 137-38.

With respect to the third proscription of the Double Jeopardy Clause, the Court rejected the proposition, also commonly relied on by the circuit courts, that the increase of a sentence after service has begun constitutes multiple punishment for a single offense. *Id.* at 138. In doing so, the Court noted that the Circuit Courts' extension of dictum in *United States v. Benz*, 282 U.S. 304, 307 (1931), to the effect that the federal practice of barring an increase in sentence by the trial court after service has begun is constitutionally based, was simply improper. *Id.* The Court noted that the *Benz* court only had occasion to hold that a court has the power to *reduce* a defendant's sentence after service has begun; its gratuitous statement that the trial court may not *increase* a sentence under these circumstances was an incorrect reading of *Ex parte Lange*, which only barred imposition of a statutorily illegal sentence. Thus, according to the *DiFrancesco* Court, this dicta in *Benz* carried neither precedential nor persuasive force. *Id.* at 138-39. Therefore, the court concluded, both *Benz* and *Lange* must be narrowly confined to their facts, and stand only for the proposition that a court may reduce a defendant's sentence after service has begun, and may not force a defendant to serve both of two alternative sentences, when the legislature has deemed that

only one of the two sentences may be imposed. Accordingly, the Court explained, the question answered by *Benz* in dicta, and relevant to this case -- whether Double Jeopardy may bar the increase of a sentence whose service has commenced -- had never been answered in the affirmative by this Court, and was no more supportable on the theory of multiple punishment than it had been under the theory of multiple prosecution. *Id.* at 139.

Thus, this Court's decision in *DiFrancesco* certainly did not hold that a sentence would be eligible for Double Jeopardy protection, and, in fact, strongly suggested the opposite, as it established that a sentence increase does not fit within the penumbra of any of the Clause's three proscriptions. Thus, it cannot be said that the state court's rejection of defendant's Double Jeopardy claim was contrary to this Court's precedent in *DiFrancesco* because, at worst, this Court never established that Double Jeopardy protection extends to a sentencing claim, and, at best, conclusively held that it did not. Thus, the lower courts' reliance on *DiFrancesco* to grant the writ in this case, and its interpretation of *DiFrancesco* as extending Double Jeopardy protection to a non-capital sentence, are both fundamentally flawed.

Additionally, this Court's extension of Double Jeopardy protection to capital sentencing proceedings (*see Bullington v. Missouri*, 451 U.S. 430 [1981]; *Arizona v. Rumsey*, 467 U.S. 203 [1984]), does not establish the asked-for rule; to the contrary, it strengthens the reasoning barring such extension to an ordinary sentencing proceeding. The extension of Double Jeopardy protection to a sentence imposed in a capital case has been justified on the grounds that a pre-sentence hearing in a capital case, at which a jury determines whether to impose the death penalty, "resembles, and indeed, in all relevant respects, is just like the immediately preceding trial on the issue of guilt or

innocence" -- a jury's refusal to impose the death penalty at such a hearing operates as an acquittal of that punishment; thus placing a subsequent increase of the sentence to death squarely within the Double Jeopardy Clause's proscription against retrial after an acquittal. *See Caspari v. Bohlen*, 510 U.S. 383, 392 (1994); *see also Strickland v. Washington*, 466 U.S. 668 (1984) ("a capital sentencing proceeding . . . is sufficiently like a trial in its adversarial format and in the existence of standards for decision"). By contrast, the imposition of an ordinary sentence, "which may involve informal proceedings and standardless discretion in the sentencer" (*Id.* at 686), does not, as discussed above, have any trappings of a trial, and may not be "regarded as an 'acquittal' of any more severe sentence that could have been imposed." *Caspari v. Bohlen*, 510 U.S. at 392; *see also United States v. DiFrancesco*, 449 U.S. at 134; *Pennsylvania v. Goldhammer*, 474 U.S. 28 (1985) (per curiam) ("the decisions of this Court 'clearly establish that a sentencing in a non capital case does not have the qualities of constitutional finality that attend an acquittal"). Thus, this Court's precedent applying the Double Jeopardy Clause to sentencing proceedings in capital cases only reaffirms its reasoning for refusing to extend its protections to sentences in non-capital cases.

Indeed, the proposition that no Supreme Court precedent has ever established that Double Jeopardy protection extends to a non-capital sentence is actually established by the dicta of this Court. In *Caspari v. Bohlen*, 510 U.S. at 383, this Court held that the Circuit Court's decision, that the Double Jeopardy Clause prohibits a State from subjecting a defendant to successive non-capital sentence enhancement proceedings, amounted to the announcement of a "new rule" of constitutional law, which could not be applied on habeas review. *Id., citing Teague v. Lane*, 489 U.S. at 288. Central to the Court's analysis of the issue was its determination that the Supreme Court had "traditional[ly]

refus[ed] to extend the Double Jeopardy Clause to sentencing." *Caspari v. Bohlen*, 510 U.S. at 392, a proposition that escalated into a conclusion, determinative of the issue in this case, that "at the time respondent's conviction and sentence became final, *this Court had not applied the Double Jeopardy Clause to noncapital sentencing, and indeed several of our cases pointed in the opposite direction.*" *Id.* at 395 (emphasis added). As the defendant's conviction in *Caspari* became final in 1986 -- more than six years after this Court's decision in *DiFrancesco* -- this language in *Caspari* affirmatively establishes that *DiFrancesco* did not establish a rule that the Double Jeopardy Clause applies to a non-capital sentencing proceeding. In other words, according to this Court's own language, as of 1986, no Supreme Court precedent governed the issue presented in this case.

Moreover, the *Caspari* Court went even further, establishing that even as of 1994, when *Caspari* was decided, no Supreme Court precedent had established this principle. *Id.* at 395, *citing Lockhart v. Nelson*, 488 U.S. 33, 37-38, n.6 (1988) (reserving question whether Double Jeopardy Clause applies to non-capital sentencing); *Hunt v. New York*, 502 U.S. 964 (1991) (White, J., dissenting from denial of certiorari) (noting that there is conflict on the question of "whether the Double Jeopardy Clause applies to trial-like sentence enhancement proceedings in noncapital cases").

Thus, because no Supreme Court precedent governs the issue presented in this case, and because the Second Circuit's interpretation of *DiFrancesco* runs contrary to the language of that decision and is contradicted by this Court's own dicta in other cases, this Court should grant the writ of certiorari in this case, both to clarify its holding in *DiFrancesco*, and to correct the Second Circuit's harmful and incorrect precedent.

CONCLUSION

Because the Second Circuit's decision in this case contravenes 28 U.S.C. § 2254, and because its rule runs contrary to this Court's precedent and is at the center of a deep and irreconcilable split of authority with nationwide implications, this Court should grant review of the Second Circuit's decision.

Respectfully submitted,

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November 12, 2002

APPENDIX

FELIBERTO ERAZO, Petitioner-Appellee, -v.- JOHN KEANE, Superintendent, Woodbourne Correctional Facility, and ELIOT SPITZER, New York State Attorney General, Respondent-Appellants.

01-2577

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

42 Fed. Appx. 527; 2002 U.S. App. LEXIS 16623

August 14, 2002, Decided

NOTICE:
[*1] RULES OF THE SECOND CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

PRIOR HISTORY:
Appeal from the United States District Court for the Eastern District of New York (Sifton, J.).

COUNSEL:
FOR APPELLANT: Donna Aldea, Assistant District Attorney (John M. Castellano, Assistant District Attorney, Richard A. Brown, District Attorney, Queens County, NY, on the brief).

FOR APPELLEE: Kevin Casey (Andrew C. Fine, The Legal Aid Society, Criminal Appeals Bureau, New York, NY, Elon Harpaz, of counsel, on the brief).

JUDGES:

PRESENT: HON. DENNIS JACOBS, HON. JOSE A. CABRANES, HON. FRED I. PARKER, Circuit Judges.

OPINION:

SUMMARY ORDER

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the order of the district court be and it hereby is AFFIRMED.

John Keane, Superintendent of the Woodbourne Correctional Facility, and Eliot Spitzer, Attorney General of the State of New York, appeal from an order of the United States District Court for the Eastern District of New York (Sifton, J.) conditionally granting a petition for a writ of habeas corpus submitted by Feliberto Erazo.

We find no error **[*2]** in the district court's decision, and affirm for substantially the reasons stated in that court's Memorandum and Order dated August 17, 2001.

For the reasons set forth above, the order of the district court is hereby AFFIRMED.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

FELIBERTO ERAZO,

Petitioner,

- against -

John P. Keane, Superintendent,
Woodbourne Correctional Facility,

Respondent.

MEMORANDUM
AND ORDER

SIFTON, Senior Judge.

Petitioner Feliberto Erazo, currently incarcerated at the Woodbourne Correctional Facility in Woodbourne, New York, petitions this Court for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. On August 12, 1991, petitioner pled guilty in the Supreme Court of the State of New York, County of Queens, to one count of criminal sale of a controlled substance in the third degree, in violation of N.Y. Penal Law § 220.39[1], and to one count of attempted criminal possession of a controlled substance in the third degree, in violation of N.Y. Penal Law §§ 110, 220.16[1]. On December 2, 1991, petitioner was sentenced as a persistent felony offender to a prison term of fifteen years to life. On January 30, 1995, the Supreme Court, Appellate Division, Second Department, found petitioner's sentence unduly harsh and reduced it in the interests of justice to seven and one-half to fifteen years. After denying respondent's motion for reargument on April 29, 1996, the appellate division sua sponte recalled and vacated its January 30, 1995 order, and

remitted the matter to the trial court for resentencing. On June 4, 1996, petitioner was resentenced to concurrent indeterminate terms of twelve and one-half to twenty-five years on the sale count and four to eight years on the attempted possession count.

Petitioner now seeks habeas corpus relief on the ground that he had a legitimate expectation of finality in his seven and one-half to fifteen years reduced sentence and that, thus, petitioner's resentence violated the constitutional prohibition against Double Jeopardy.

For the reasons set forth below, petitioner's petition for habeas corpus will be granted unless petitioner is resentenced within thirty days of the date of this order to a term of imprisonment of no more than seven and one-half to fifteen years.

BACKGROUND

The following relevant facts are established by the state court proceedings and the parties' submission in connection with the petition.

On January 28, 1991, at approximately 8:30 p.m., petitioner sold cocaine to three people who were subsequently arrested in possession of that cocaine. Shortly thereafter, the police arrested petitioner and recovered $155 from his pocket and twenty-one vials of cocaine from a paper bag on the curb near where petitioner was standing.

Petitioner was charged with three counts of criminal sale of a controlled substance in the third degree, N.Y. Penal Law § 220.39[1]; one count of criminal possession of a controlled substance in the third degree, N.Y. Penal Law § 220.16[1]; and one count of criminal possession of a controlled

substance in the fifth degree, N.Y. Penal Law § 220.06[5]. On August 12, 1991, petitioner pled guilty to one count of criminal sale of a controlled substance in the third degree, in violation of N.Y. Penal Law § 220.39[1], and to one count of attempted criminal possession of a controlled substance in the third degree, in violation of N.Y. Penal Law §§ 110, 220.16[1].

The terms of petitioner's plea bargain were that the court would release petitioner from custody until his sentencing date, which was set for September 30, 1991, and that, if petitioner did not get arrested or convicted of another crime and cooperated the probation department in the interim, the court would dismiss the third-degree sale count, and sentence petitioner to a prison term of four to eight years on the attempted possession count. If petitioner failed to comply with any of these conditions, as the court informed petitioner, it would not dismiss the third-degree sale count and would impose an enhanced sentence of either twelve and one-half to twenty-five years as a "second felony offender,"[1] the maximum term for a class B felony, or fifteen years to life as a "persistent felony offender."[2]

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[1] A second felony offender is "a person, other than a second violent felony offender as defined in section 70.04, who stands convicted of a felony . . . after having previously been subjected to one or more predicate felony convictions . . ." N.Y. Penal Law § 70.06.

[2] A persistent felony offender is "a person, other than a persistent violent felony offender as defined in section 70.08, who stands convicted of a felony after having previously been convicted of two or more felonies . . . ." N.Y. Penal Law § 70.10. Respondent filed a statement alleging that petitioner was both a second felony offender and a persistent felony offender based on a January 8, 1982 plea to attempted robbery in the second degree for which petitioner was sentenced to a prison term of one to three years and a September 13, 1985 plea to attempted criminal possession of a controlled substance in the fourth degree for which petitioner was sentenced to a prison term of three to six years.

On September 30, 1991, petitioner failed to appear for sentencing, and the court ordered a warrant for his arrest and return. On October 18, 1991, the court conducted a hearing regarding efforts to locate petitioner. Following the hearing, the court declared petitioner to be an absconder and sentenced him *in absentia* to an indeterminate prison term of fifteen years to life as a persistent felony offender.

On December 2, 1991, petitioner was brought before the court following his arrest for burglary and grand larceny. After listening to petitioner's explanation for failing to return to court, the court reaffirmed the previously imposed sentence of fifteen years to life imprisonment.

Appellate History

On December 11, 1991, petitioner appealed his sentence to the Supreme Court, Appellate Division, Second Department. Petitioner argued, *inter alia*, that petitioner's sentence as a persistent felony offender was illegal because the court had failed to follow the procedural requirements set forth in N.Y. Penal Law § 70.10[3] and because the sentence

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[3] New York Penal Law § 70.10 states in pertinent part:

> When the court has found, pursuant to the provisions of the criminal procedure law, that a person is a persistent felony offender, and when it is of the opinion that the history and character of the defendant and the nature and circumstances of his criminal conduct indicate that extended incarceration and life-time supervision will best serve the public interest, the court, in lieu of imposing the sentence of imprisonment authorized by section 70.00, 70.02, 70.04 or 70.06 for the crime of which such person presently stands convicted, may impose the sentence of imprisonment authorized by that section for

was harsh and excessive. In petitioner's brief, petitioner's counsel erroneously stated that petitioner had pled guilty to attempted criminal sale of a controlled substance in the third degree, rather than the completed crime, but correctly noted that petitioner had also pled guilty to attempted criminal possession of a controlled substance in the third degree.

On January 30, 1995, the appellate division held that petitioner's prison sentence was unduly harsh and as a "matter of discretion in the interest of justice," reduced petitioner's sentence to an indeterminate prison term of seven and one-half to fifteen years (the "reducer sentence"). *People v. Erazo*, 622 N.Y.S.2d 86 (App. Div. 1995). In the appellate division's decision, the court erroneously stated that petitioner had been convicted of attempted criminal sale of a controlled substance in the third degree but did not specifically address the sentencing court's finding that petitioner was a persistent felony offender nor petitioner's argument that the sentencing judge failed to comply with the procedural requirements of New York Penal Law § 70.10. *See id.*[4]

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a class A-I felony. In such event, the reasons for the court's opinion shall be forth in the record.

[4] The appellate division, in light of the fact that the court did not specifically vacate the sentencing court's finding that petitioner was a persistent felony offender, felt that the sentencing court's sentence of fifteen years to life, although authorized under the persistent felony offender statute, *see* N.Y. Penal Law § 70.10, was harsh and excessive in this case. The appellate division apparently felt that the sentencing court should have more appropriately exercised its discretion in sentencing petitioner as a second felony offender rather than as a persistent felony offender, as authorized and discussed more fully *infra*, to a sentence proscribed in N.Y. Penal Law § 70.06, entitled "Sentence of imprisonment for second felony offender."

On April 30, 1995, three months after the appellate division's decision, the prosecution made an untimely motion pursuant to 22 N.Y.C.R.R. 670.6(a)[5] to reargue the issues dealt with in the appellate division's January 30, 1995 decision and to issue an order vacating that decision and affirming petitioner's judgment of conviction. The prosecution noted in its appellate brief that both petitioner and the prosecution misstated petitioner's conviction as one for attempted criminal sale of a controlled substance in the third degree rather than the completed crime. The prosecution argued that, as a result of the court's misapprehension of petitioner's conviction, the court had reduced petitioner's prison term to seven and one-half to fifteen years, a sentence below that required for a persistent felony offender. On August 9, 1995, the appellate division summarily denied the prosecutor's motion for reargument.[6]

On April 29, 1996, approximately nine months after denying the respondent's motion to reargue, the appellate division *sua sponte* recalled its January 30, 1995 order, granted

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[5] 22 N.Y.C.R.R. 670.6(a), entitled "Motions to reargue, resettle or amend," states in pertinent part:

> Motions to reargue a cause or motion, or resettle or amend a decision and order shall be made within 30 days after service of a copy of the decision and order determining the cause or motion . . . . The papers in support of every such motion shall concisely state the points claimed to have been overlooked or misapprehended by the court, with appropriate references to the particular potions of the record or briefs and with citation of the authorization relied upon.

[6] Subsequent to the appellate division's denial of respondent's motion to reargue, Dave Tarr, a clerk in the appeals division of the trial court, submitted a letter dated November 20, 1995, in which he apprised the Second Department that petitioner had been convicted of criminal sale of a controlled substance in the third degree rather than an attempt.

respondent's motion for reargument, withdrew its original decision and issued a new one which affirmed petitioner's conviction for criminal sale of a controlled substance in the third degree, vacated petitioner's reduced sentence, and remitted the matter to the trial court for resentencing. *See People v. Erazo*, 622 N.Y.2d 86 (App. Div. 1996). In so holding, the Second Department stated that,

> [h]aving examined the record, including the transcripts of the plea and sentence proceedings, we cannot determine which charges or charges the defendant was convicted of and sentenced for. Therefore, we remit this matter to the Supreme Court, Queens County, for clarification in accordance with this decision and order.

Id. at 742.[7]

On June 4, 1996, the trial court resentenced petitioner to concurrent indeterminate terms of twelve and one-half to twenty-five years on the sale count and four to eight years on the attempted possession count (the "resentence").[8]

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[7] The appellate division apparently felt that it made a substantial mistake in reducing petitioner's sentence but felt that the sentencing court had also erred in some respect such that the appellate division was unable to correct its prior mistake.

[8] The court's rensentence of petitioner was consistent with the appellate division's view that petitioner ought to be sentenced as a second felony offender rather than a persistent felony offender, which authorizes a court to impose a maximum sentence of twelve and one-half to twenty-five years for a class B felony. *See* Penal Law §§ 70.06(3)(b), (4)(b).

On June 19, 1996, petitioner, *pro se*, moved to vacate his sentence pursuant to N.Y.C.P.L. § 440.20,[9] contending that his new term of imprisonment was illegal and unauthorized because it did not conform with the appellate division's January 30, 1995 order reducing petitioner's sentence to seven and one-half to fifteen years. On August 27, 1996, the sentencing court denied petitioner's motion to vacate, holding that petitioner's resentence was legal and authorized for a persistent non-violent felony offender convicted of a class B felony.

In January 1999, petitioner appealed his resentence to the appellate division arguing that (1) the appellate division did not have the authority to recall and vacate its January 30, 1995 order because the reduced sentence was not defective and did not result from any clerical error; thus, petitioner had an expectation of finality in his reduced sentence, and his resentence violated Double Jeopardy; (2) his sentence was unduly harsh; and (3) he received ineffective assistance of counsel at resentencing. On July 6, 1999, the appellate division affirmed petitioner's amended judgment of conviction, holding that petitioner's sentence was not excessive and that petitioner's remaining arguments lacked merit. *See People v. Erazo*, 691 N.Y.S.2d 908 (App. Div. 1999).

On August 26, 1999, petitioner sought leave to appeal the appellate division's decision denying his Double Jeopardy claim to the New York Court of Appeals. That application

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[9] Section 440.20 states in pertinent part that:

> At any time after the entry of a judgment, the court in which the judgment was entered may, upon motion of the defendant, set aside the sentence upon the ground that it was unauthorized, illegally imposed or otherwise invalid as a matter of law.

was denied on November 29, 1999. *See People v. Erazo*, 94 N.Y.2d 822 (1999). Petitioner then filed the instant petition.

DISCUSSION

Petitioner is in custody pursuant to the judgment of a state court and alleges that he is in custody in violation of the Constitution of the United States. *See* 28 U.S.C. § 2254. His petition is in writing, signed, and verified. *See* 28 U.S.C. § 2242.

A petition for habeas relief must be timely filed pursuant to 28 U.S.C. § 2254(d)(1).[10] Petitioner's conviction

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[10] Section 2244(d) (1) states:

> (d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of —
>
> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

became final on February 27, 2000, when the 90-day period for seeking a writ of certiorari to the Supreme Court expired. *See Williams v. Artuz*, 237 F.3d 147, 148 (2d Cir. 2001). Thus, petitioner's petition filed on February 23, 2001 is timely.

Before a federal court may grant a petitioner's application for a writ of habeas corpus, it must be clear that the petitioner has exhausted his state remedies either on direct appeal or through collateral attack of his conviction. *See* 28 U.S.C. § 2254(b)(1); *O'Sullivan v. Boerckel*, 526 U.S. 838, 842-43 (1999); *Bossett v. Walker*, 41 F.3d 825, 828 (2d Cir. 1994). All of petitioner's claims are exhausted and properly before the Court for habeas review.[11]

On appeal, petitioner argued that his sentence violated Double Jeopardy. That claim was rejected by the appellate division on its merits. Thus, under 28 U.S.C. § 2254(d)(1),[12] I may only grant petitioner a writ of habeas

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[11] Respondent suggests that to the extent petitioner's Double Jeopardy claims rests on the allegedly improper communications between Supreme Court Clerk David Tarr and the appellate division, that claim is unexhausted. The argument is without merit. First, Tarr's memorandum is peripheral to petitioner's claim and thus, exhaustion on that issue is not required for the Court to address the substance of petitioner's claim. Second, petitioner in fact referred to Tarr's memorandum in his brief to the appellate division, so the issue was presented to the appellate division and, thus, is deemed exhausted. *See Daye v. Attorney General*, 696 F.2d 186, 190-91 n.3 (2d Cir. 1982).

[12] 28 U.S.C. § 2254(d) states:

> An application for a writ of habeas corpus on behalf of person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim —
>
> (1) resulted in a decision that was contrary to,

corpus is the appellate division's holding was "contrary to, or involved an unreasonable application of," the constitutional prohibition against Double Jeopardy as established by the Supreme Court. *Id.* These two claims have "independent meaning." *Williams v. Taylor*, 529 U.S. 362, 405 (2000); *accord Williams v. Artuz*, No. 98 Civ. 5130, 2000 WL 915-74, at *5 (E.D.N.Y. July 5, 2000). Under the first clause, a state court decision will be considered "contrary to" federal law if it either "applies a rule that contradicts the governing law set forth in [the Supreme Court's] cases" or "confronts a set of facts that are materially indistinguishable from a decision of [the Supreme Court] and precedent." *Taylor*, 529 U.S. at 406. Under the second clause, a habeas petitioner may win relief if the state court decision "correctly identifies the governing legal rule but applies it unreasonably to the facts of a particular prisoner's case." *Id.* at 407. Petitioner does not contend that the appellate division, in rejecting his Double Jeopardy claim, followed a rule contrary to Supreme Court precedent or that his case presented facts indistinguishable from those in relevant Supreme Court opinion that the appellate division disregarded. Accordingly, he is entitled to habeas relief only if the court's application of governing law to his case was unreasonable. *See Taylor*, 529 U.S. at 407.

Petitioner argues that under *United States v. DiFrancesco*, 449 U.S. 117 (1980), the appellate division should have found that vacatura of his reduced sentence and his subsequent resentencing violated the prohibition against Double Jeopardy because he developed a legitimate expectation of finality once the prosecution's motion for reargument was denied. Respondent argues that under the sentencing laws of New York State, a petitioner has no

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or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.

expectation of finality in a sentence that a court still has the authority to modify. Respondent argues that the appellate division retained authority to modify the sentence because: (1) in imposing petitioner's reduced sentence, the appellate division was mistaken about the crime for which petitioner was convicted; and (ii) petitioner's reduced sentence was illegal. Respondent contends that, because petitioner was informed when he pled guilty that he could receive the sentence ultimately imposed, petitioner's resentence did not violate the prohibition against Double Jeopardy.

The Fifth Amendment to the United States Constitution, applicable to the states through the Fourteenth Amendment, *see Benton v. Maryland*, 395 U.S. 784, 794 (1969), provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const. Amend. V. The Double Jeopardy Clause "represents a fundamental ideal in our constitutional heritage," *Benton*, 395 U.S. at 794,[13] and, *inter alia*, "protects against multiple

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[13] The Supreme Court, in *Green v. United States*, 355 U.S. 184 (1957), stated that:

> The constitutional prohibition against "Double Jeopardy" was designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense . . . . The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilt.

Id. at 187-188.

punishments for the same offense." *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969).

In *DiFrancesco*, 449 U.S. at 138-39, the Supreme Court held that a sentence could be increased upon the government's statutorily authorized direct appeal even though the defendant had already commenced service of that sentence, stating that "[under such circumstances there can be no expectation of finality in the original sentence." "Consistent with this rationale, the circuits have generally concluded that the key to Double Jeopardy analysis of a sentence increase is whether the defendant had a legitimate expectation in the finality of his original sentence." *Stewart v. Scully*, 925 F.2d 58, 63 (2d Cir. 1991) (citations omitted); *see also United States v. Triestman*, 178 F.3d 624, 630 (2d Cir. 1999) (stating that Double Jeopardy prohibits court "from enhancing a defendant's sentence once the defendant has developed a 'legitimate expectation of finality in the original sentence'") (citation omitted); *United States v. Foumai*, 910 F.2d 617, 619-20 (1990) ("It is well established that the Double Jeopardy Clause prohibits augmentation of a criminal sentence when it would violate the defendant's reasonable expectation of finality.").

In evaluating whether a legitimate expectation of finality has attached to a sentence, courts look to the laws of the jurisdiction where sentences was imposed. *See, e.g., Stone v. Godbehere*, 894 F.2d 1131, 1135 (9th Cir. 1989) (finding that Arizona law created defendant's expectation of finality because "Arizona Superiority Courts have no authority to modify a lawful sentence once orally pronounced"). In the context of appellate review, a legitimate expectation of finality attaches when the "appeal is concluded or the time to

appeal has expired." *DiFrancesco*, 449 U.S. at 136;[14] *see also Foumai*, 910 F.2d at 620 ("No expression of finality can attach during the period in which either party may appeal").

The appellate division in this case reduced petitioner's sentence to an indeterminate prison term of seven and one-half to fifteen years on January 30, 1995. As respondent conceded at oral argument, respondent had no right to appeal from the appellate division's order. Thus, petitioner had a expectation of finality immediately following the appellate division's decision and order. *See Williams v. Travis*, 143 F.3d 98, 99 (2d Cir. 1998) (noting that an important factor bearing upon a defendant's expectation of finality is the government's ability to appeal the defendant's sentence). Petitioner's expectation of finality was enhanced by the appellate division's subsequent denial of the prosecution's motion to reargue the court's January 30, 1995 decision and order, particularly in light of the fact that the prosecution noted the court's error in its application. Thus, when the court denied respondent's untimely motion to reargue its January 30, 1995 decision and order, eight months after it was rendered, and no further appeal was permitted, *see Masters, Inc. v. White House Discounts, Inc.*, 500 N.Y.S.2d 790, 792 (2d Dept. 1996), petitioner was quite justified in assuming that his reduced sentence had become final. Petitioner's expectation of finality was even further enhanced by the fact that he served a substantial period of his sentence, approximately fifteen months, between the time his sentence was reduced and the time the appellate division vacated its order. Under these circumstances, immediately prior to the court's vacatura of its order reducing petitioner's sentence,

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[14] The Supreme Court in *DiFrancesco* further noted that "the appeal may prolong the period of anxiety that may exist, but it does so only for the finite period provided by the statute." 449 U.S. at 136.

petitioner had a justified expectation of finality in his reduced sentence.

Respondent argues that under New York law, petitioner had no expectation of finality in his reduced sentence because the appellate division maintained the authority to modify it. A lawful sentence "may not be changed, suspended or interrupted once the terms or period of the sentence has commenced." N.Y. C.P.L. § 430.10. Nonetheless, a New York State court maintains the authority to modify a sentence that is illegal, *see People v. Williams*, 87 N.Y.2d 1014 (1996), that is imposed as a result of defendant's fraud or misrepresentation, *see People v. Jason*, 660 N.Y.S.2d 760 (2d Dept. 1997), or that was imposed as a result of a clerical error apparent on the face of the record, *see Matter of Kisloff v. Covington*, 73 N.Y.2d 445, 541 N.Y.S.2d 737 (1989). Respondent contends that the modified sentence was both the result of a mistake as well as illegal and that, thus, petitioner's resentence did not violate the constitutional prohibition against Double Jeopardy. The arguments are without merit.

New York courts have the authority to modify a sentence once commenced "where the record demonstrates that the Judge merely misspoke in imposing sentence or it is clear from the record that a patent clerical error has been made in imposing sentence." *Matter of Kisloff*, 73 N.Y.2d at 450 (citations omitted); *see also People v. Minaya*, 54 N.Y.2d 360, 365 (1981) (holding that, where it is undisputed that plea agreement provided for an eight year sentence and defendant initially sentenced to a term of three years, court had inherent authority to correct the mistake). In *Matter of Kisloff*, 73 N.Y.2d 455, both the parties and the judge mistakenly believed that attempted grand larceny in the third degree was a class E felony offense rather than a class A misdemeanor at

the time defendant entered his guilty plea,[15] and because "defendant was a predicate felony offender[,] the shortest authorized indeterminate sentence that could be imposed was for a maximum of at least three years and a minimum of one-half the maximum, i.e., 11/2 years." *Id.* at 448 (citations omitted). The defendant was subsequently sentenced to the previously agreed upon sentence and began serving his time. *See id.* On the date defendant had been indicted, however, attempted grand larceny in the third degree was a class A misdemeanor for which the maximum sentence was one year. The error was eventually discovered and the defendant subsequently reappeared before the judge who took defendant's plea. The judge proposed that defendant plead to grand larceny in the fourth degree, a class E felony, in order to support the sentence agreed to and previously imposed. *See id.* Defendant rejected the judge's proposal and insisted upon being sentenced in accordance with his misdemeanor plea to attempted grand larceny, third degree, The court then vacated the plea and set the matter down for trial. *See id.*

Defendant then commenced an article 78 proceeding seeking to prohibit further prosecution on the felony charges and to have his original plea reinstated and be resentenced as a misdemeanor offender. *See id.* at 448. The appellate division granted the application prohibiting respondents from pursuing further criminal proceedings against defendant on the original indictment, reinstated the judgment of conviction, and remanded the matter to the supreme court for resentencing. *See id.* The New York Court of Appeals granted leave to appeal.

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[15] Apparently, the legislature's reclassification of attempted grand larceny in the third degree to a class E felony did not take effect until after defendant entered his plea and was sentenced. *See id.*

The prosecution argued that there was a mutual mistake of material fact which the court could correct in the exercise of its inherent power to conform the record to the truth. *See id.* at 449. The Court of Appeals rejected that claim, stating:

> Once defendant's sentence was imposed and judgment was entered, [] his plea could not be disturbed based upon the parties' mutual mistake since no statutory basis existed for setting aside such a plea and courts have no "inherent power to vacate a plea and sentence over defendant's objection where the error goes beyond mere clerical error apparent on the face of the record and where the proceeding has terminated by the entry of the judgment."

Id. at 452 (quoting *Matter of Campbell v. Pesce*, 60 N.Y.2d 165, 169 (1983)). The Court of Appeals held that the sentencing court acted in excess of its power and noted that "any further criminal proceedings on the original charges are barred by [defendant's] constitutional right not to be twice put in jeopardy." *Id.*

Here, to the extent petitioner's modified sentence was based on a mistake,[16] such mistake is more akin to the mutual mistake in *Matter of Kisloff* than a mere clerical error. The appellate division's decision vacating petitioner's reduced

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[16]It is not altogether clear whether the appellate division was affected by its purported misapprehension that petitioner had been convicted of attempted sale of a controlled substance rather than the completed crime in reducing petitioner's sentence because New York Penal Law provides that the sentencing range for a second felony offender convicted of a class B non-violent felony offense (which criminal sale of a controlled substance is) is a maximum term of nine to twenty-five years and a minimum term of four and one-half to twelve and one-half years. *See* N.Y. Penal Law §§ 70.06(3)(b), (4)(b). The appellate division's modified sentence of seven and one-half to fifteen years was within that range.

sentence specifically states that the court "cannot determine which charge or charges the defendant was convicted of and sentenced for." *Erazo*, 642 N.Y.S.2d at 534. Accordingly, any error committed by the appellate division was not a "mere clerical error apparent on the face of the record." *Matter of Campbell*, 60 N.Y.2d at 169.[17] Accordingly, the appellate division did not possess the inherent authority to modify petitioner's reduced sentence based on its purported mistake.

Notwithstanding the general prohibition against modifying a lawful sentence, New York courts have the inherent authority to correct a sentence that is illegal. *See* N.Y. C.P.L. § 4350.15(2)(c);[18] *Williams*, 87 N.Y.2d at 1015; *People v. Peale*, 504 N.Y.S.2d 321 (App. Div. 1986) (stating that

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[17]The fact that respondent moved to reargue the appellate division's decision on the basis that the court previously misapprehended the crime petitioner was convicted of, an application that was subsequently denied, undermines respondent's argument that the appellate division's mistake eliminated petitioner's expectation of finality in his reduced sentence.

[18]New York Criminal Procedure Law § 470.15 states in pertinent part:

> Upon such an appeal, the intermediate appellate court must either affirm or reverse or modify the criminal court judgment, sentence or order. The ways in which it may modify a judgment include, but are not limited to, the following: . . . .
>
> (C) Upon a determination that a sentence imposed upon a valid conviction is illegal or unduly harsh or severe, the court may modify the judgment by reversing it with respect to the sentence and by otherwise affirming it.

N.Y. C.P.L. § 470.15(2)(c).

"this court cannot permit a sentence which is invalid as a matter of law to stand").

Contrary to respondent's argument, however, petitioner's reduced sentence was not illegal because the appellate division was entitled to sentence petitioner to a term of imprisonment other than that authorized by the persistent felony offender statute. *See* N.Y. Penal Law § 70.10;[19] *cf.* N.Y. Penal Law §§ 70.08(2) & (3) (stating that when the court has found that a defendant is a "persistent violent felony offender the court *must* impose an indeterminate sentence of imprisonment") (emphasis added); N.Y. Penal Law §§ 70.06(2) & (3) (requiring courts to impose maximum and minimum sentences within a statutory range where defendant is found to be a second felony offender). Section 70.10 of the New York Penal Law gives trial judges the discretionary authority to "impose the sentence of imprisonment specified for a Class A-1 Felony if the

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[19]The persistent felony offender statute states in pertinent part:

> When the court has found . . . that a person is a persistent felony offender, and when it is of the opinion that the history and character of the defendant and the nature and circumstances of his criminal conduct indicate that extended incarceration and life-time supervision will best serve the public interest, the court . . . may impose the sentence of imprisonment authorized by the section for a class A-I felony. In such event the reasons for the court's opinion shall be set forth in the record.

N.Y. Penal Law § 70.10(2) (emphasis added).

defendant is shown to be a persistent felony offender.[20]" *People v. Moran*, 443 N.Y.S.2d 119, 121 (N.Y. Sup. Ct. 1981). Thus, in light of the statute's discretionary nature, it is not illegal for a court to exercise its discretion in sentencing a defendant found to be a persistent felony offender to a term of imprisonment less than that authorized under section 70.10. *See People v. Morse*, 476 N.Y.2d 205, 230 (1984) (Jasen, J., dissenting) (stating that the persistent non-violent felony offender stature "permits a greater measure of lenience, authorizing the sentencing court to exercise discretion in imposing a range of permissible sentences"); 34 N.Y. Jur. 2d criminal Law § 2904 (1995).[21]

Where a defendant has been convicted of a B felony, as petitioner has, and is found to be both a persistent felony offender and a second felony offender, as petitioner has, the sentencing court may impose either: (1) a lifetime sentence where the court is of the opinion that extended incarceration and lifetime supervision will best serve the public interest as for a Class A-I felony; or (2) a sentence under section 70.06. *See Sailor v. Scully*, 836 F.2d 118, 121 n.2 (2d Cir. 1987); *People v. Yale*, 373 N.Y.S.2d 901, 49 A.D.2d 167, 170-71 (App. Div. 1975); *see also Molesse*, 557 N.Y.S.2d at 389 (stating that "upon properly adjudicating the defendant a persistent felony

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[20]The authorized sentence for a class A-1 felony is a minimum period of imprisonment of not less than fifteen and not more than twenty-five years, and a maximum term of life. *See* N.Y. Penal Law §§ 70.00(2), (3)(a)(i); *see also People v. Molesse*, 557 N.Y.S.2d 387, 389 (App. Div. 1990).

[21]Respondent's argument is further undermined by the fact that the sentencing court, while maintaining its finding that petitioner was a persistent felony offender, resentenced petitioner to a term of imprisonment of twelve and one-half to twenty-five years. According to respondent's argument, petitioner's resentence would also be illegal because the minimum sentence is less than the fifteen years required for a class A-1 felony. *See* N.Y. Penal Law § 70.00(3) (a)(i).

offender, the court had the option of imposing concurrent or consecutive terms of imprisonment authorized by Penal Law § 70.06(3)(c) for a second felony offender . . . or imposing sentences of imprisonment authorized for a class A-I felony offender").

Petitioner's reduced sentence of seven and one-half to fifteen years of imprisonment was within the legal range for a class B felony. *See* N.Y. Penal Law §§ 70.06(3)(b), (4) (b) (stating that the maximum term of an indeterminate sentence for a second felony offender must be at least nine years and must not exceed twenty-five years and the minimum must be fixed as one-half the maximum term imposed). Thus, petitioner's reduced sentence was not illegal, and therefore, the appellate division exceeded its powers in vacating its order nearly fifteen months after reducing petitioner's sentence and, in turn, violated petitioner's constitutional right not to be put twice in jeopardy.

CONCLUSION

For the reasons set forth below, petitioner's writ of habeas corpus is conditionally granted. Petitioner is to be released from custody unless he is resentenced within thirty days of the date of this order to a term of imprisonment of no more than seven and one-half to fifteen years.

The Clerk is direct to furnish a filed copy of the within to all parties.

SO ORDERED.

Dated: Brooklyn, New York
August 16, 2001

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United States District Judge

People, Resp. v. Erazo (Feliberto), App.

[NO NUMBER IN ORIGINAL]

COURT OF APPEALS OF NEW YORK

94 N.Y.2d 822; 724 N.E.2d 384; 702 N.Y.S.2d 592; 1999 N.Y. LEXIS 4133

November 29, 1999, Decided

NOTICE:
[*1] DECISION WITHOUT PUBLISHED OPINION

PRIOR HISTORY:
Queens County; A.D.2d; order 07/06/99.

JUDGES:
Ciparick, J.

OPINION:

LEAVE TO APPEAL

Denied

The People of the State of New York, Respondent, v. Feliberto Erazo, Appellant.

96-05912

SUPREME COURT OF NEW YORK, APPELLATE DIVISION, SECOND DEPARTMENT

263 A.D.2d 460; 691 N.Y.S.2d 908; 1999 N.Y. App. Div. LEXIS 7720

May 24, 1999, Argued

July 6, 1999, Decided

PRIOR HISTORY:
[*1]**

Appeal by the defendant from an amended judgment of the Supreme Court, Queens County (Rotker, J.), rendered June 4, 1996, convicting him of criminal sale of a controlled substance in the third degree and attempted criminal possession of a controlled substance in the third degree, upon his plea of guilty, and imposing sentence.

COUNSEL:
M. Sue Wycoff, New York, N.Y. (Elizabeth J. Miller of counsel), for appellant.

Richard A. Brown, District Attorney, Kew Gardens, N.Y. (John M. Castellano, Nicoletta J. Caferri, and Roni C. Piplani of counsel), for respondent.

JUDGES:

Ritter, J. P., Thompson, Altman and Friedmann, JJ., concur.

OPINION:

[*461] **[**909]** Ordered that the amended judgment is affirmed.

Contrary to the defendant's argument, his sentence was not excessive (*see, People v Suitte, 90 AD2d 80*).

The defendant's remaining arguments are without merit (*see, 22 NYCRR 670.6* [a]; *People v Wright, 56 NY2d 613; Cuyler v Sullivan, 446 US 335; People v Adams, 247 AD2d 819*).

Ritter, J. P., Thompson, Altman and Friedmann, JJ., concur.

SUPREME COURT: STATE OF NEW YORK
QUEENS COUNTY: CRIMINAL TERM: K-4
125-01 Queens Boulevard, Kew Gardens, NY 11415

PRESENT:
Hon. SEYMOUR ROTKER

Justice.

THE PEOPLE OF THE STATE OF NEW YORK

-against-

FELIBERTO ERAZO,

Defendant.

By: SEYMOUR ROTKER, J.
Indictment No. 10252/91
Motion: To Set Aside Sentence
Submitted: 7/31/96

The following papers numbered Defendant, Pro Se

1 to 21 submitted in this motion

For the motion
RICHARD A. BROWN, D.A.

BY: LISA R. MARLOW, A.D.A.
Opposed

	Pages Numbered
Notice of Motion and Affidavits annexed __	1-7
Answering and Reply Affidavits annexed __	8-16

Minutes (Grand Jury) 17-21

Upon the foregoing papers, and due deliberation had, the motion is, in all respects, denied. See accompanying memorandum this date.

Dated: August 27, 1996

SEYMOUR ROTKER,
Acting J.S.C.

THE PEOPLE OF THE STATE OF NEW YORK

-against-

FELIBERTO ERAZO,

Defendant.

By: SEYMOUR ROTKER, J.
Indictment No. 10252/91
MEMORANDUM DECISION

Defendant, Pro Se moves, pursuant to CPL 440.20, for an Order vacating the sentence imposed on June 4, 1996, on the ground that it is illegal in that it does not conform with the Appellate Division order.

The defendant maintains that the sentence originally imposed by the Court of fifteen (15) years to life, was reduced by the Appellate Division to seven and one-half (7 ½) years to fifteen (15) years. The defendant further maintains that the Court's sentence on June 4, 1996, to an indeterminate term of twelve and one-half (12 ½) years to twenty-five (25) years, does not follow the Appellate Division's directive, and is, therefore, illegal.

The defendant was charged, under the instant indictment, with the crimes of Criminal Sale of a Controlled Substance in the Third Degree, and Criminal Possession of a Controlled Substance in the Third Degree.

On August 12, 1991, the defendant pled guilty to the crimes of Criminal Sale of a Controlled Substance in the Third Degree, and Attempted Criminal Possession of a Controlled Substance in the Third Degree. In return for this plea, the defendant was promised a dismissal of the Sale Count, and a sentence on the Attempted Possession Count. In order to achieve this, the defendant was required to cooperate with Probation, return for sentence, and not be re-arrested in the interim. If the defendant did not abide by these three conditions, the Court informed him that he would receive either a sentence of twelve and one-half (12 ½) years to twenty-five (25) years or fifteen (15) years to life.

The defendant failed to appear for sentence, and on October 18, 1991, the Court held an absentia hearing following which the defendant was sentenced to an indeterminate term of imprisonment of fifteen (15) years to life as a persistent non-violent felony offender. Sentence was executed on December 2, 1991.

On appeal to the Appellate Division, Second Department, both the defendant and the District Attorney indicated that the defendant was convicted of Attempted Sale of a Controlled Substance in the Third Degree and sentences thereunder.

On January 30, 1995, the Appellate Division, Second Department, modified defendant's sentence to a term of seven and one-half (7 ½) years to fifteen (15) years,

erroneously noting that defendant had been convicted of Attempted Sale of a Controlled Substance in the Third Degree, (*People v. Feliberto Erazo*, __AD2d__, No. 91-11298).

On April 30, 1995, the People filed a motion, pursuant to 22 NYCRR, Section 670.6(a), for reconsideration by the Appellate Division, of its decision rendered January 30, 1995, reducing the defendant's sentence.

On April 29, 1996, the Appellate Division, Second Department, issued a decision and order vacating the sentence reduction of seven and one-half (7 ½) years to fifteen (15) years, affirmed the conviction of Criminal Sale of a Controlled Substance in the Third Degree and remitted the matter to Court for re-sentence.

On June 4, 1996, the Court re-sentenced the defendant to an indeterminate term of imprisonment of twelve and one-half (12 ½) years to twenty-five (25) years for the conviction of Criminal Sale of a Controlled Substance in the Third Degree.

On June 25, 1996, the defendant made the instant motion.

On a motion to set aside a sentence, only an allegation of legal defect is considered, (Preiser, Practice Commentaries, Section 440.20, p. 558). A legal defect exists because the sentence was not authorized by law or because it was illegally imposed, (Preiser, Practice Commentaries, *supra*). Within that single allegation that the sentence was not legally imposed, illegalities such as the fact that the sentence was not authorized for the offense of which the defendant was convicted; the erroneous imposition of consecutive sentences;

erroneous sentencing as a second or third felony offender; improper revocation of probation, or of a conditional discharge; due process errors in the sentencing procedures; lack of counsel at the sentencing, or failing to give a proper allocution, may be considered, (Preiser, Practice Commentaries, *supra*).

None of these conditions exist herein. The Appellate Division, Second Department, vacated the sentence reduction it had imposed. It affirmed the defendant's conviction, and remitted the matter to Supreme Court for clarification and re-sentence. This order was silent as to a term of im imprisonment to be imposed. Clearly leaving the imposition of sentence to the discretion of the court.

The defendant was convicted of a B-felony, and found to be a persistent non-violent felony offender. This status did not change with the return from the Appellate Division (CPL 400.21(8)).

The sentence structure for a B-felony of a persistent non-violent felony, is a minimum of one-half (½) the maximum. The maximum sentence is at least nine (9) years, and no more than twenty-five (25) years.

Defendant's sentence of twelve and one-half (12 ½) years to twenty-five (25) years, is within the legally permissible range, and is, therefore, legal.

Claims of excessive or harsh sentences may not be raised in a motion, pursuant to CPL 440.20, (Preiser, Practice Commentaries, *supra*).

The motion is, in all respects, denied.

Order entered accordingly.

The Clerk of the Court is directed to furnish the defendant with a copy of this decision and order at his present place of incarceration.

Dated: August 27, 1996

SEYMOUR ROTKER,
Acting J.S.C.

The People of the State of New York, Respondent, v. Feliberto Erazo, Appellant.

91-11298

SUPREME COURT OF NEW YORK, APPELLATE DIVISION, SECOND DEPARTMENT

226 A.D.2d 741; 642 N.Y.S.2d 534; 1996 N.Y. App. Div. LEXIS 4715

January 3, 1995, Submitted

April 29, 1996, Decided

PRIOR HISTORY:
[1]**

On the Court's own motion, it is

CASE SUMMARY

PROCEDURAL POSTURE: Defendant filed a motion for reargument of his appeal from a judgment of the Supreme Court, Queens County (New York), which convicted him, inter alia, of criminal sale of a controlled substance in the third degree upon his plea of guilty and imposed sentence.

OVERVIEW: The court granted defendant's motion for reargument, recalled and vacated its prior decision, and modified the trial court's judgment by vacating the sentence imposed. The court affirmed the judgment as modified but, because it could not determine which charge or charges

defendant was convicted of and sentenced for, it remitted the matter to the trial court for clarification.

OUTCOME: The court modified the trial court's judgment by vacating the sentence imposed, affirmed the judgment as modified, and remitted the matter to the trial court for clarification and resentencing.

COUNSEL:
George T. Dunn, New York, N.Y., for appellant.

Richard A. Brown, District Attorney, Kew Gardens, N.Y. (Steven J. Chananie, Robin A. Forshaw, and Shawn Kerby of counsel), for respondent.

JUDGES:
Ritter, J. P., Copertino, Joy and Hart, JJ., concur.

OPINION:

[*741] Ordered that the decision and order of this Court on motion dated August 9, 1995, is recalled and vacated, and the following decision and order is substituted therefor:

Motion by the respondent for reargument of an appeal from a judgment of the Supreme Court, Queens County, rendered December 2, 1991, which was modified by decision and order of this Court dated January 30, 1995.

Upon the papers filed in support of the motion and papers filed in opposition thereto, it is

Ordered that the motion is granted, and upon reargument, the decision and order of this Court dated

January 30, 1995 (211 AD2d 809), is recalled and vacated and the following decision and order is substituted therefor:

Appeal by the defendant from a judgment of the Supreme Court, Queens County (Rotker, J.), rendered December 2, 1991, convicting him, *inter alia*, of criminal sale of a controlled substance **[**2]** in the third degree, upon his plea of guilty, and imposing sentence.

Ordered that the judgment is modified, on the law and as a matter of discretion in the interest of justice, by vacating the **[*742]** sentence imposed; as so modified, the judgment is affirmed, and the matter is remitted to the Supreme Court, Queens County, for resentencing in accordance herewith.

Having examined the record, including the transcripts of the plea and sentence proceedings, we cannot determine which charge or charges the defendant was convicted of and sentenced for. Therefore, we remit this matter to the Supreme Court, Queens County, for clarification in accordance with this decision and order.

Ritter, J. P., Copertino, Joy and Hart, JJ., concur.

People, Resp. v. Erazo (Feliberto), App.

[NO NUMBER IN ORIGINAL]

COURT OF APPEALS OF NEW YORK

86 N.Y.2d 734; 655 N.E.2d 712; 631 N.Y.S.2d 615; 1995 N.Y. LEXIS 3130

June 5, 1995, Decided

PRIOR HISTORY:
[*1] Queens County; AD 2d; order January 30, 1995.

JUDGES:
Ciparick, J.

OPINION:

LEAVE TO APPEAL

Denied

The People, etc., respondent, v. Feliberto Erazo, appellant. (Ind. No. 10252/91)

91-11298

SUPREME COURT OF NEW YORK, APPELLATE DIVISION, SECOND DEPARTMENT

211 A.D.2d 809; 622 N.Y.S.2d 86; 1995 N.Y. App. Div. LEXIS 634

January 3, 1995, Submitted

January 30, 1995, Decided

SUBSEQUENT HISTORY:
[***1] As Revised June 2, 1995.

CASE SUMMARY

PROCEDURAL POSTURE: Defendant challenged a judgment of the Supreme Court, Queens County (New York), which convicted him, upon his plea of guilty, of attempted criminal sale of a controlled substance in the third degree. The trial court imposed sentence of imprisonment from 15 years to life imprisonment.

OVERVIEW: Defendant failed to appear for sentencing and was subsequently arrested on unrelated charges, both events constituting violations of his plea agreement. In accordance with the plea agreement, the trial court, which had promised to sentence defendant to an indeterminate term of four to eight years imprisonment if he complied with the trial court's

directives, instead sentenced defendant as a persistent nonviolent felony offender under *N.Y. Penal Law § 70.10.* On appeal, the court ruled that the grounds set forth by defendant in support of his claim of ineffective assistance of counsel, insofar as reviewable on the record, lacked merit. But considering all of the circumstances of the case, the enhanced sentence imposed by the trial court was unduly harsh. As a matter of discretion in the interest of justice, the court reduced the sentence to an indeterminate term of seven and one-half to 15 years imprisonment.

OUTCOME: The court modified the judgment, as a matter of discretion in the interest of justice, by reducing the term of imprisonment from 15 years to life imprisonment to seven and one-half years to 15 years' imprisonment. As so modified, the court affirmed the judgment.

COUNSEL:
George T. Dunn, New York, N.Y., for appellant.

Richard A. Brown, District Attorney, Kew Gardens, N.Y. (Steven J. Chananie, Robin A. Forshaw, and Shawn Kerby of counsel), for respondent.

JUDGES:
DAVID S. RITTER, J.P., JOHN COPERTINO, DANIEL W. JOY, EDWARD J. HART, JJ.

OPINION:

[*809] [86]** DECISION & ORDER

Appeal by the defendant from a judgment of the Supreme Court, Queens County (Rotker, J.), rendered December 2, 1991, convicting him of attempted criminal sale of a controlled [**87] substance in the third degree, upon his plea of guilty, and imposing sentence.

ORDERED that the judgment is modified, as a matter of discretion in the interest of justice, by reducing the term of imprisonment from 15 years to life imprisonment to 7 ½ to 15 years imprisonment; as so modified, the judgment is affirmed.

The grounds set forth by the defendant in support of his claim of ineffective assistance of counsel, insofar as reviewable on this record, lack merit.

The defendant failed to appear for sentencing and was [*810] subsequently [***2] arrested on unrelated charges, both events constituting violations of the plea agreement. In accordance with that agreement, the court, which had promised to sentence the defendant to an indeterminate term of 4 to 8 years imprisonment if he complied with the court's directives, sentenced the defendant, as a persistent nonviolent felony offender (see, *Penal Law § 70.10*; see also, *People v Molesse, 162 AD2d 629, 557 N.Y.S.2d 387)*, to a term of 15 years to life imprisonment. Considering all of the circumstances of this case, we conclude that the enhanced sentence imposed by the Supreme Court was unduly harsh. As a matter of discretion in the interest of justice, we reduce the sentence to an indeterminate term of 7 ½ to 15 years imprisonment (see, *People v Prescott, 196 AD2d 599, 601 N.Y.S.2d 325; People v McCoy, 182 AD2d 713, 582 N.Y.S.2d 479)*.

RITTER, J.P., COPERTINO, JOY and HART, JJ., concur.